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No. 601

In the Supreme Court of the United States

OCTOBER TERM, 1960

RICHARD McKAY, PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-9a) is reported at 283 F. 2d 399.

JURISDICTION

The judgment of the Court of Appeals was entered on October 27, 1960. A petition for rehearing was denied on November 29, 1960. The petition for a writ of certiorari was filed on December 24, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Court of Appeals properly found that a search, in the course of which narcotics were found, was incident to a valid arrest of petitioner on probable cause.

STATEMENT

Petitioner was convicted in the United States District Court for the Southern District of Indiana on two counts charging narcotics violations under 26 U.S.C. 4704(a) and 21 U.S.C. 174. He was sentenced to two years on count one and five years on count two, the sentences to run consecutively (Pet. 4, 1a).

The issues raised on petition relate to the circumstances of petitioner's arrest and the attendant search and seizure of narcotics. A motion by petitioner to suppress the evidence of narcotics, made prior to trial and renewed at the time of trial, was denied after full hearing on both occasions (1 Tr. 184; 2 Tr. 147).[1] On appeal, the denial of the motion to suppress was affirmed (Pet. 1a-6a).

The pertinent facts adduced at the hearings on the motion to suppress are as follows:

On May 21, 1959, Officers William Owen and Robert Keithley of the Narcotics Detail of the Police Department of Indianapolis, Indiana, arrested Clinton

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[1] The transcripts of the hearing on petitioner's motion to suppress, held on November 10, 1959, and the hearing on the renewal of the motion at the trial are filed herewith. The November 10 transcript is designated herein as 1 Tr., and the trial transcript as 2 Tr.

Tucker, a drug addict. Aided by Federal Narcotics Agent James Wilkie, they recovered from Tucker forty-one capsules of heroin which he had buried in his back yard (1 Tr. 13-14, 28, 46-47). Tucker told the officers that he had received the heroin from petitioner (whom he knew as "James Johnson" and as "Richard"), and that he was to pick up one hundred and fifty more capsules at petitioner's house at 7:30, that evening (1 Tr. 15, 28-29, 81-82). Tucker gave the police petitioner's address, described the special knock he was to use, and told them that petitioner was leaving Indianapolis that night for Chicago in an old model maroon or brown Hudson automobile which would be parked in front of petitioner's house (1 Tr. 29-30).

Indianapolis police had been conducting a vigorous investigation of petitioner's narcotics activities for about six months, and both they and the Federal Narcotics Bureau had known of petitioner's activities as a narcotics peddler for three or four years (1 Tr. 20-21, 80-81). On the basis of this information and the information secured from Tucker, Officer Owen secured an arrest warrant (for violation of the Indiana Narcotics Act of 1935) from the office of the Indianapolis prosecutor (1 Tr. 9-12, 19-21).

Accompanied by Keithley and Wilkie, Owen went to the address given him by Tucker, saw the automobile which he had been told would be outside, gave the special knock, and was admitted by petitioner's wife when he responded "Tuck" to a request for identification (1 Tr. 22, 29-31, 36, 74-75). When Owen showed petitioner's wife the warrant, she di-

rected him upstairs where he found petitioner and placed him under arrest[2] (1 Tr. 22-23, 31-32, 61, 75-77, 108). Petitioner pointed out several items of stolen property, but denied possession of narcotics (1 Tr. 32-33). Officer Owen noticed that the contents of a package of napkins on a dinette table at which petitioner was seated had been disarranged; when he removed some of the napkins from the box, he found an aluminum foil package which contained several capsules of white powder. A field test revealed the powder to be an opium derivative (1 Tr. 33-34, 77, 111-112).

Petitioner was released on bond by the Indiana authorities and rearrested on a federal warrant on May 22, 1959 (1 Tr. 78-79, 84). The case against petitioner was dismissed by Indiana authorities at the request of the Federal Narcotics Bureau (1 Tr. 44-46, 83-84).

Although the records of the Indianapolis Police Department showed that an affidavit had been filed and an arrest warrant returned for petitioner, the warrant itself could not be found (1 Tr. 23-26, 89-90; 2 Tr. 123-124, 136-147).

The District Court found that the arrest was made under a warrant valid under Indiana law, but held that no arrest warrant was required because the in-

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[2] Petitioner and his wife testified that Owen had no warrant and entered with his gun drawn. Owen denied that he used a gun and neither Keithley nor Wilkie, who were behind Owen, saw a gun in his hand. Both Keithley and Wilkie testified that Owen had a warrant when he entered petitioner's house and that petitioner read the warrant (1 Tr. 60-62, 68-69, 74, 76, 100, 108).

formation provided by Tucker and the recovery from him of the narcotics sold to him by petitioner constituted probable cause sufficient to justify petitioner's arrest without a warrant (1 Tr. 173-176). The court held further that the search was lawful because it was incident to a valid arrest (1 Tr. 176-178, 184; 2 Tr. 147).

On appeal, the court below affirmed the denial of the motion to suppress. It found that the arresting officers had sufficient information concerning petitioner's activities to constitute probable cause for his arrest without a warrant, and that it was, therefore, unnecessary to determine whether a valid arrest warrant had been secured (Pet. 1a-6a).

ARGUMENT

The question of the validity of the arrest warrant, which petitioner argues at length (Pet. 2-3, 9-14), need not be determined. Both the Court of Appeals and the District Court have found that the arresting officers had probable cause for the arrest of petitioner. And it is clear that, even though an arrest is made under color of a warrant which may be defective, the arrest and the attendant search will be deemed lawful if the arresting officers had probable cause to believe that a felony had been, or was being, committed. See *United States* v. *Rabinowitz*, 339 U.S. 56, 60-65.

The record supports the findings below that there was probable cause. The arresting officers had the concrete evidence of the commission of a felony in the heroin capsules taken from Tucker. This was coupled

with Tucker's naming of petitioner as the source of the narcotics. Other information given the officers by Tucker, such as petitioner's presence at the stated address, the presence of a Hudson automobile, and the response to the special knock, was corroborated by the officers prior to the time petitioner was placed under arrest. Certainly, the detailed information secured from Tucker, corroborated by the officers' own observations, as well as by information previously secured from other sources, constituted probable cause for petitioner's arrest. See *Draper* v. *United States*, 358 U.S. 307; *Brinegar* v. *United States*, 338 U.S. 160, 175. Having lawfully arrested petitioner, the officers, under both federal law and the law of Indiana, had the authority to search for and seize narcotics secreted in a package less than a yard from the place petitioner was seated. See *Harris* v. *United States*, 331 U.S. 145; see, also, *Bays* v. *State*, 159 N.E. 2d 393 (Ind., 1959), certiorari denied, 361 U.S. 972. Since the search and seizure were lawful under both state and federal law, the denial of the motion to suppress the evidence in the federal prosecution was proper. *Elkins* v. *United States*, 364 U.S. 206.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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